

*Present:*

*Mr. Justice A.K.M. Asaduzzaman*

*Civil Revision No.889 of 2018*

*Md. Nojir Ahmed being dead his legal  
heirs Most. Kohinur Begum and others.*

*.....Petitioners.*

*-Versus-*

*Kanai Lal Sil and others*

*.....Opposite parties.*

*Mr. A.K. Rashedul Huq, Advocate.*

*.....For the petitioners.*

*Mrs. Chowdhury Nasima, Adv.*

*.....For the Opposite party no.1.*

*Heard and Judgment on 30.05.2024.*

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite party no.1 and 10-13 to show cause as to why the judgment and decree dated 29.11.2017 passed by the Joint District Judge, 2<sup>nd</sup> Court, Patuakhali in Title Appeal No. 22 of 2014 affirming those dated 30.01.2014 passed by the Assistant Judge, Dasmina, Patuakhali in Title Suit No. 79 of 2009 decreeing the suit should not be set aside.

Plaint Case in short inter-alia, is that Rammanikko, Toronikanto, Nogendra, and Jogendra were the recorded owners

of R.S. Khatian No. 158 corresponding to S. A. Khatian No. 278 of Mouza Arozbegi, Upazila-Dasmina, District-Patuakhali. 04 Annas of share had been recorded each one's name. On the death of Nogendra, his wife Birbala enjoyed the property on her life interest and after the death of Birbala, plaintiff Kanai Lal Sen, son of Jogendra Nath inherited 2.8125 acres of land as heirs of 04 annas share of Nogendra Nath as per Hindu Dayavag Laws. As there was no partition amongst the co-sharers, he filed this suit for partition of the suit land.

Petitioner contested the suit as defendant by filing written statement denying the plaint case alleging, inter-alia, that Nogendra was the recorded owner of Revisional Survey (R.S) khatian No. 158 corresponding to State Acquisition (S.A) Khatian No. 278 of Mouza-Arozbegi, Upazila-Dasmina, District-Patuakhali in respect of 04 annas share. On the death of Nogendra as per Hindu Dayavag Laws, Nogendra's brother Jogendra remained the only heir. Thus Jogendra became owner of 08 annas share (04 annas his own and 04 annas inherited from his brother). Thereafter, Jogendra by executing 02 sale deeds transferred 2.58 acres of land on 06.07.1956 in favour of Abual Kashem and others, predecessor of these defendants. Jogendra previously transferred 3.33 acres of land on 20.02.1956 in favour of Abul

Kashem and others, predecessor of these defendants by executing 02 sale deeds.. Toronikanto Sil another recorded owner, transferred 0.05 acres of land in favour of defendant nos. 3-5 by executing sale deed no. 3125 dated 09.04.1985. Accordingly defendants are owners and possessors of 5.92 acres of land by way of purchase. Plaintiff to be illegally benefited, framed the false personification of Birbala, wife of Nogendra Nath. Thus the suit is liable to be dismissed.

During trial following issues were framed.

1. Whether the suit is maintainable in it's present form ?
2. Whether the suit is bad for defect of parties ?
3. Whether the suit is barred by hotchpotch?
4. Whether the plaintiff has got right, title and possession over the suit land?
5. What else relief or relieves plaintiff are entitled to get ?

In order to prove the respective cases, plaintiff adduced 05(five) P.Ws and exhibited number of document, which were exhibited as Exhibit No. 1-7(ka) and defendants examined 02(two) witnesses and annexed with some document in Exhibit No. Ka to kha(1).

By the judgment and decree dated 30.01.2014 Assistant Judge, Dasmina, Patuakhali decreed the suit in preliminary form.

Challenging the said judgment and decree, defendant-petitioner preferred Title Appeal No. 22 of 2014 before the Court of District Judge, Patuakhali, which was heard on transfer by the Joint District Judge, 2<sup>nd</sup> Court, Patuakhali, who by the impugned judgment and decree dated 29.11.2017 dismissed the appeal and affirmed the judgment of the trial court.

Being aggrieved there against defendant-petitioner obtained the instant rule.

Mr. A.K. Rashedul Huq, the learned advocate appearing for the petitioner submits that both the courts below erred in law in decreeing the suit, when plaintiff failed to establish his title and possession over the suit property as well as his contention as has been narrated in the plaint, the decree passed in favour of plaintiff giving his saham is illegal. The impugned judgment is thus not sustainable in law, which is liable to be set aside.

Mrs. Chowdhury Nasima, the learned advocates appearing for the opposite party on the other hand submits that courts below rightly assessed that Birbala died after Jogendra and property went to her life interest and subsequently Kanai Lal Sil inherited the

property of Nogendra and accordingly gave him saham in accordance with law rightly. In the concurrent judgment of the courts below contains no illegality, he finally prays that rule may be discharged.

Heard the learned Advocate of both the sides and perused the impugned judgment and the L.C. Records.

This is a suit for partition. Plaintiff's claimed in the plaint that out of the 02 (two) brothers Jogendra and Nogendra. Nogendra died childless and leaving behind widow Birbala, who possessed the suit property as her life interest and after the death of Birbala, Kanai Lal Sen, son of Jogendra inherited the share of Nogendra and thereby he claimed partition of the suit property as per the share he obtained through Nogendra. On the other hand, defendant claimed that Nogendra died childless and Jogendra while owning and possessing his 04 annas share and getting the property of Nogendra i.e. another 04 annas share all together 08 annas share, he transferred those to the defendants and their predecessor in different sale deeds, which were registered on 06.07.1956 and 20.02.1956 and thereby no property was there for Birbala or any other person as a heirs of Nogendra. So, there is nothing to left for plaintiff Kanai Lal Sen. Moreover the defendant's contention is that Birbala, the wife of Nogendra died

before Jogendra and in those 02 accounts nothing was left there to inherit as claimed by the plaintiff, as the property of Nogendra. Upon discussing and considering the evidence on record both the courts below concurrently find that Birbala died after Jogendra and inherited the property of Nogendra till her death and after her death, the son of Jogendra named Kanai Lal Sen, who is the plaintiff, inherit the share of Nogendra.

Now let us see how far this findings is correct from the records.

In the plaint although plaintiff urged that property of Nogendra was illegally been transferred by way of registered sale deed in the year 1956 to the defendants but plaintiff did not challenge the said deed either in the instant suit or filing a separate suit. While deposing in court P.W.1 Kanai Lal Sen also admits the same. In a plaint plaintiff has only prayed that-

‘(ক) নিম্ন (ক) তপছিল বর্ণিত বিভাজ্য ভূমি মোতালক বাদীর অংশের ভূমিতে বাদীর অনুকূলে বন্টনের প্রাথমিক ডিক্রী দেওয়ার প্রার্থনা:

(খ) আদালতের দেওয়া নির্দিষ্ট সময়ের মধ্যে বিবাদীগন বাদীর অংশের ভূমি বন্টন করিয়া না দিলে বাদীর নিকট হইতে কমিশন ফি গ্রহণে জনৈক সার্ভে অভিজ্ঞ কমিশনার নিযুক্ত করিয়া তদ্বারা বিভাজ্য ভূমির

পরিমান করাইয়া বাদীর অংশের ভূমির পৃথক ছাহাম প্রস্তুতে তাহাতে  
বাদীর অনুকূলে নটনের ফাইনাল ডিক্রী দেওয়ার প্রার্থনা।

(গ) আদালত ব্যায় বিবাদীগন প্রতিকূলে ডিক্রী দেওয়ার প্রার্থনা

এবং

(ঘ) আদালতের ন্যায় বিচারে আইন ও ইকুইটি মতে বাদী আর  
যে যে প্রতিকার পাইতে পারে তাহার ডিক্রী দেওয়ার প্রার্থনা।’

And while deposing in court Kanai Lal Sen as P.W.1 also  
stated in his deposition that

‘যোগেন্দ্রনাথ বিবাদীগন বরাবর যে ৪ কেত্তা দলিল দিয়েছে তার  
মধ্যে নগেন্দ্রনাথ এর জমি অন্তর্ভুক্ত করায় ঐ দলিল সমূহ জাল-জালিয়াতি  
ও মিথ্যা। দাতা যোগেন্দ্রনাথ ও গ্রহীতা আবুল কাশেম ৬/৭/৫৬ তারিখের  
৩৭৫৫, ৩৭৫৬ নং দলিল দুইটি জাল জালিয়াতি। ঐ দাতা গ্রহীতার মধ্যে  
২০/০২/৫৬ তারিখে ৫১৪ ও ৫১৫ নং রেজিস্ট্রিকৃত দলিল জাল  
জালিয়াতি। কারন ঐ ৪ কেত্তা দলিলে নগেন্দ্রনাথ এর জমি অন্তর্ভুক্ত  
করেছে।’

He further stated in his deposition that

‘তর্কিত দলিলসমূহ জাল। উহা জাল সে সম্পর্কে জেনেছি ২০০২  
সালে। আমার বাবা তার অংশেরটা দিয়েছে সে সম্পর্কে আমাও কোন  
দরকার নাই। আমি মামার জ্যাঠারটা চাই। উক্ত দলিলসমূহ জাল কারন  
অন্যের সম্পত্তি তাতে অন্তর্ভুক্ত করেছে। কয়টি দলিলে জাল করেছে তা

আমি বলতে পারি না। উক্ত জাল জালিয়াতি দলিল বাতিলে পূর্বে কোন মামলা করি নাই।'

In that view of the matter, when the plaintiff admits the transfer of the share of Nogendra by his father through registered sale deed but he did not file any suit, challenging the said deed. If that been so the deed of transferring the property of Nogendra as been given by the father of the plaintiff to the defendants stands as well as been admitted and the document not been challenged before any court by which property of Nogendra been transferred along with the share of Jogendra to the defendants, there remains nothing to claim by the plaintiffs for the share of Nogendra, which has already been sold out earlier, long before. Whether Birbala was there as a widow of Nogendra or not, this question is not material in the instant suit. Both the courts below failed to consider this true aspect of the case and travelled beyond the pleadings and decreed the suit making out a 3<sup>rd</sup> case. When Kanai Lal Sen inherits nothing from the share of Nogendra, the instant suit for partition to get the share of Nogendra does not arise at all and suit is not maintainable in it's present form. Unless and until the deed through which Jogendra transferred the share of his own together with the share of his brother Nogendra to others being



declared by any competent court as being forged and fraudulent one, the instant suit for partition is not maintainable.

The learned advocate appearing for the plaintiff-opposite party prays for sending the suit back on remand with a permission to amend the prayer and make a proper prayer to get the remedy in this suit but at this stage it is not possible to send the matter afresh to fill up the lacuna. Plaintiff has got liberty to institute any suit if so desire claiming proper remedy in a proper court. Accordingly the prayer is rejected.

However, regard being had to the above law, facts and circumstances of the case, I am of the opinion that both the courts below commits error of law in passing the decree in favour of the plaintiff, without having proper consideration on the facts and circumstances of the case. The impugned judgment is not sustainable in law, which is liable to be set aside.

In that view of the matter, I find merits in this rule. Accordingly the Rule is made absolute without any order as to costs. The judgment and decree passed by the court below are hereby set aside and the suit is dismissed.

Let the order of stay granted earlier by this court is hereby recalled and vacated.

Send down the L.C.Records and communicate the judgment to the court below at once.